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In re Application of
ROBERT H. SHELTON
Application No. 09/025,279
Filed: February 18, 1998
Attorney Docket No. A39-972-010

ON PETITION

This is a decision on the petition filed June 16, 1998, requesting that the above-identified application be accorded a filing date of February 17, 1998 rather than the presently accorded filing date of February 18, 1998.

The petition is dismissed.

Petitioner requests the earlier filing date on the basis that the application was purportedly deposited in Express Mail service on February 17, 1998, pursuant to the requirements of 37 CFR 1.10. Petitioner acknowledges that the date of deposit in Express Mail shown on petitioner's Express Mail receipt is February 18, 1998, but argues that the application was actually deposited in an Express Mail drop box on February 17, 1998, before the last scheduled pick up for the day.

The petition is accompanied by a statement by a USPS employee which states:

Our investigation revealed that although your Express Mail article was deposited on the 17th, it was not scanned into our system until February 18, 1998, when it was processed at the Airport Mail Center in Dallas. When a mailpiece is placed in a collection box, due to time constraints of meeting collection schedules, the Express Mail may not be scanned in at your local Post Office.

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Paragraph (a) of 37 CFR 1.10 states that:

Any correspondence received by the Patent and Trademark Office (Office) that was delivered by the "Express Mail Post Office to Addressee" service of the United States Postal Service (USPS) will be considered filed in the Office on the date of deposit with the USPS. The date of deposit with the USPS is shown by the "date-in" on the "Express Mail" mailing label or other official USPS notation. If the USPS deposit date cannot be determined, the correspondence will be accorded the Office receipt date as the filing date. See §1.6(a) [Emphasis supplied].

Paragraph (d) of 37 CFR 1.10 states that:

Any person filing correspondence under this section that was received by the Office and delivered by the "Express Mail Post Office to Addressee" service of the USPS, who can show that the "date-in" on the "Express Mail" mailing label or other official notation entered by the USPS was incorrectly entered or omitted by the USPS, may petition the Commissioner to accord the correspondence a filing date as of the date the correspondence is shown to have been deposited with the USPS, provided that:

- (1) The petition is filed promptly after the person becomes aware that the Office has accorded, or will accord, a filing date based upon an incorrect entry by the USPS;
- (2) The number of the "Express Mail" mailing label was placed on the paper(s) or fee(s) that constitute the correspondence prior to the original mailing by "Express Mail"; and
- (3) The petition includes a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day. Any showing pursuant to this paragraph must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the "Express Mail Post Office to Addressee" service of the USPS. Any

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statement submitted in support of such a showing pursuant to this paragraph must be a verified statement if made by a person other than an employee of the USPS or a practitioner as defined in § 10.1(r) of this chapter.

A grantable petition under 37 CFR 1.10(d) must include "a showing which establishes, to the satisfaction of the Commissioner, that the requested filing date was the date the correspondence was deposited in "Express Mail Post Office to Addressee" service prior to the last scheduled pickup for that day." In addition, the showing "must be corroborated by evidence from the USPS or that came into being after deposit and within one business day of the deposit of the correspondence in the 'Express Mail Post Office to Addressee' service of the USPS." Evidence from the USPS may be, for example, the Express Mail Corporate Account Mailing Statement or a statement by an appropriate official of the USPS that according to a USPS record, the "date-in" on petitioner's Express Mail receipt is erroneous and is accompanied by a copy of the relevant USPS record. Evidence that came into being within one day after the deposit of the correspondence as Express Mail may be, for example, a log book which contains information, such as the Express Mail label number; the application number, attorney docket number or other such file identification number; the place, date and time of deposit; the time of the last scheduled pick-up for that date and place of deposit; the depositor's initials or signature; and the date and time of the log book entry.

The statement from the USPS employee only corroborates the fact that the Express Mail package was deposited on February 17, 1998. The statement does not corroborate the time of the last scheduled pick up from the Express Mail drop box where the package was dropped nor that the package was deposited in that particular Express Mail drop box prior to the last scheduled pick up. Further, the statement is not accompanied by a copy of the relevant USPS record which evidences that the "date-in" on the Express Mail label is erroneous.

Therefore, since the petition filed June 16, 1998 is not accompanied by the corroborating evidence required by the rule, the petition must be dismissed.

Correspondence should be deposited directly with an employee of the USPS to ensure that the person depositing the correspondence receives a legible copy of the "Express Mail" mailing label with the "date-in" clearly marked. Persons dealing indirectly with the employees of the USPS (such as by deposit in an "Express Mail" drop box) do so at the risk of not receiving a copy of the

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"Express Mail" mailing label with the desired "date-in" clearly marked.

It is unfortunate that petitioner chose to deposit a paper as important as a patent application in Express Mail without immediately obtaining an Express Mail receipt showing the desired date of deposit. Further, since this is not the first petition filed by petitioner herein with essentially the same set of facts, petitioner was well aware that he assumes the risk of not receiving the desired "date-in" by depositing his Express Mail package in a drop box. Accordingly, in the future, petitioner would be wise to avoid the use of Express Mail drop or collection boxes when the filing date of the correspondence being mailed is critical.

Further correspondence with respect to this matter should be addressed as follows:


By mail: Assistant Commissioner for Patents
Box DAC
Washington, D.C. 20231

By FAX: (703) 308-6916
Attn: Office of Petitions

By HAND: Crystal Plaza Four, Suite 3C23
2201 South Clark Place
Arlington, Virginia 22202

Telephone inquiries concerning this matter may be directed to Frances Hicks at (703) 305-8680.

The application is being returned to Examining Group 2771 for examination in due course with the presently accorded filing date of February 18, 1998.


Brian Hearn
Petitions Examiner
Office of Petitions
Office of the Deputy Commissioner
for Patent Examination Policy

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